85-1110

Supreme Court, U.S.
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CASE NO.:

IN THE

SUPREME COURT OF THE UNITED STATES

October, Term, 1985

ELECDORO CARRALERO

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

Whether the trial court erred in denying the Defendant's Motion To Suppress the physical evidence seized wherein it was tainted by the prior unlawful search of the premises and the illegal arrest of the Defendant by overzealous law enforcement officers in violation of the Fourth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

United States of America
Elecdoro Carralero
Frank Leyva
Raul Garcia

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OPINION BELOW

The opinion of the lower Court is appended hereto.

JURISDICTION

The Judgement of the Court of Appeals for the Eleventh Circuit affirming the Petitioner's Conviction was entered on June 21, 1984.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254 (1) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particulary describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On March 16, 1984, between 10:00 - 10:30 A.M., DEA agent Jacobsen received a call from a confidential informant. The informant told him that he had been contacted by Luis Valdez, who stated that Valdez had been detained for 15 days on a farm in a rural area of south Dade County; and that while being detained, he had seen from 20,000 to 25,000 pounds of marijuana which were guarded by people with submachine guns and silencers. (Supp. Tr. 3-4).

After receiving the information, DEA agent Jacobsen made several unsucessful attempts to contact Luis Valdez. (Supp. Tr. 5, 15-17). Therefore, at 3:30 - 4:00 P.M., Jacobsen and another agent went out to the farm and simply rode by a

couple of times. The farmhouse was 150 to 200 yards from the road. Jacobsen saw a man, woman and children in the yard. The agents then returned to their office and attempted to get a warrant, but the Assistant United States Attorney advised them that they needed Luis Valdez's affidavit before they could obtain a warrant. (Supp. Tr. 19-21). It was now about 6:00 P.M., and the agents again made an unsuccessful attempt to talk to Luis Valdez. (Supp. Tr. 6). Unable to obtain a search warrant, the agents decided to go out to the farmhouse to allegedly talk to the residents to obtain information about the alleged kidnapping, and the marijuana. (Supp. Tr. 25, 118).

The law enforcement officers arrived at the farmhouse about 8:15 P.M.

It was dark outside. There were two unmarked cars and two marked Dade County Police vehicles carrying eleven law enforcement officers (Supp. Tr. 45), with shot guns and automatic weapons. (Supp. Tr. 22-23). One of the marked cars went to the west side of the property to secure the back, while the other three vehicles proceeded up a 150 - 200 yard lane through two gates with their lights on towards the front of the farmhouse. The marked car was the second vehicle in the procession as they approached the lighted farmhouse. (Supp. Tr. 8-9, 61).

The marked car had its red and blue lights flashing as it proceeded up to the house. (Supp. Tr. 57), even though the eleven law enforcement officers were allegedly going to the farmhouse to talk

to the residents. The Dade County policemen were dressed in their khaki uniforms, while the DEA agents wore their "raid jackets" which bear the DEA shield on the left breast, and a DEA logo on the right shoulder. On the back, the raid jackets contained, in bright yellow letters, approximately four inches high, the word "Police," and under that it has the words "U. S. Agents." (Supp. Tr. 11; Tr. 39).

As they approached the farmhouse, the agents in the first car saw two males standing in the doorway, who fled and were later identified as Defendant Carralero and co-defendant Leyva. (Supp. Tr. 9, 50-54). As they stopped the car, the agents saw a man, later identified as co- defendant Garcia, crouched beside

a car near the front porch. Garcia made a motion towards his rear pocket, but the agents subdued him and found a pistol in his back pocket. Garcia was then handcuffed and arrested. (Supp. Tr. 10-11; Tr. 45-46). After Garcia was subdued, Agent Eaton, who was in the first unmarked vehicle, went to the front door of the house, which was slightly ajar, pushed it open, looked around the corner with his gun in his hand, and ordered the occupants outside. The occupants, two Latin males, a female, a teenage boy and a teenage girl, all complied. (Supp. Tr. 52-53).

In the meantime, agent Joura heard noises from the rear of the house and proceeded to the back yard where he went through a gate and found two individuals under an abandoned car in a pasture

behind the main house. (Supp. Tr. 90). They were later identified as Defendant Carralero and co-defendant Leyva. (Supp. Tr. 53; Tr. 135). Defendants Carrelero and Leyva were considered to be under arrest at that point. (Supp. Tr. 107). Agent Joura was provided a flashlight and assistance from Agent McEnany who was in the third unmarked car. (Tr. 96). Joura permitted other agents to take Carralero and Leyva to the front of the house while he proceeded to inspect some chicken coops and a cockfighting ring, adjacent to the main house. He found some bags with marijuana residue in the chicken coops. (Supp. Tr. 92-93).

While Joura was inspecting the chicken coops, Agent McEnany performed a "security check" of the main house. He

went through the back door; where he smelled marijuana from the back porch and later saw thirty-two (32) bales of marijuana in a rear room of the farmhouse. He found no people in the house during his room to room search. (Supp. Tr. 64-6[illegible], [illegible]). Defendant Carralero was already under arrest when Agent McEnany got to the front door of the house at the conclusion of his room to room search. (Supp. Tr. 54, 73).

Agent McEnany performed the so called "security search" of the house, even though he heard Agent Eaton order everyone out several minutes earlier (Supp. Tr. 76-77). Ten minutes later, Agent McEnany returned inside the house where he found, in addition to the marijuana, two pistols, scales, writing

pads, and the other evidence used at trial. (Supp. Tr. 67-68).

Agent Joura, upon completion of his inspection of the chicken coops, then proceeded through the back door of the farmhouse where he also smelled and found marijuana in a rear room at the house. (Supp. Tr. 93-94). Joura testified that even though there was no pending application for a warrant, the officers had to search the premises as a "security check" in order to protect the officers holding the suspects outside the house. (Supp. Tr. 135). There were five people arrested that evening; however, two were released without prosecution. (Supp. Tr. 37).

Prior to his trial, the Defendant adopted the Motion to Suppress filed by

co-defendant Garcia. (R. 18-20). A hearing on the Motion to Suppress was held before the trial judge on May 16 and 17, 1984. (Supp. Tr. 1-157A). The bases of Defendant's Motion to Suppress is that: (1) the physical evidence, to wit, marijuana, scales, pistols, writing pad, etc. obtained from the farmhouse was illegally seized; (2) Defendant's fingerprints were illegally seized; and (3) that his arrest was without probable cause, therefore the evidence should be suppressed. The motion was granted as to co-defendant Garcia, but denied as to Defendant Carralero and co-defendant Leyva solely because the Court determined that Carralero and Leyva did not have standing to complain about the illegal warrantless search in this case. (Supp. Tr. A 40).

REASON FOR GRANTING WRIT

THE DECISIONS BELOW ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE PHYSICAL EVIDENCE SEIZED WHEREIN IT WAS TAINED BY THE PRIOR UNLAWFUL SEARCH OF THE PREMISES AND THE ILLEGAL ARREST OF THE DEFENDANT BY OVER ZEALOUS LAW ENFORCEMENT OFFICERS IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THEREBY PRESENTING AN IMPORTANT FEDERAL QUESTION

A.

The Defendant Has A Legitimate Expectation Of Privacy In All Of Articles Illegally Seized And The Place Searched

The trial court denied Defendant Carralero's Motion to Suppress only because it held that Carralero did not have "standing" to assert the Fourth Amendment rights that the Court acknowledged had been violated by the law enforcement personnel. (Supp. Tr. A. 40). However, the question of whether a person is entitled to assert Fourth Amendment

rights in a given situation is no longer analyzed in terms of "standing." The proper analysis proceeds directly to the substance of a defendant's Fourth Amendment claim to determine whether the defendant had a reasonable and legitimate expectation of privacy in the articles at the time of the search. Rakas v. Illinois, 439 U.S. 128 (1978).

In determining the right of a defendant to challenge a search or seizure, the totality of circumstances must be examined. United States v. Torres, 705 F. 2d 1287, 1292 (11th Cir. 1983); Rakas v. Illinois, 439 U.S. 128, 152, (1978).

The court should consider factors such as ownership, possessory interests in the item seized or the place searched, normal precautions to maintain privacy, whether he has the right to exclude others from

the premises, and whether he is legitmately on the premises. United States v.Haydel, 649 F. 2d 1152 (5th Cir. (1981).

In the instant case, the farm house was located in a remote area with two gates leading up to the front of the house which was surrounded by a barbed wire fence. The defendant Carralero was a guest of the co-defendant homeowner and the police raid took place late at night. It is clear that precautions were being taken to maintain privacy and that the Defendant was legitimately on the premises with the permission of defendant Garcia.

Several courts have determined that a guest in anothers home can possess a legitimate expectation of privacy, thus permitting the guest the right to challenge the search of the host's home, thereby distinguishing a guest from the "casual

visitor" noted in Rakas v. Illinois, supra. See, United States v. Torres, 705 F. 2d 1287, 1295 (11th Cir. 1983); United States v. Perez, 700 F. 2d 1232, 1236;(8th Cir. 1983); United States v. Haydel, 649 F. 2d 1152, 1155 (5th Cir. 1981); United States v. Robertson, 606 F. 2d 853, 858, n. 2 (9th Cir. 1979). In fact, Carralero spent a lot of time on the property in that he owned a pony which he kept on the premises for which he paid rent to co-defendant Garcia, a friend of many years.

Based upon the totality of the circumstances, the length of time Carralero knew Garcia, the remoteness of the farmhouse, the double gates leading up to the farm house, the leasehold interest of renting stable facilities from Garcia and the late evening police raid all point to

a reasonable and legitimate expectation of privacy in the articles seized from the farmhouse. Therefore, Carralero's Motion to Suppress should be granted just as was the case with Garcia.

Most importantly from a constitutional rights perspective, this Court should not allow over zealous law enforcement officers to infringe upon Fourth Amendment privacy rights because of a lack of perceived proprietary interest in the place searched. The fears perceived by the four dissenting members of this court in the landmark decision of Rakas v. Illinois, 439 U.S. 128, 168-169 have come to pass. In Rakas the dissenters stated:

> the ruling today undercuts the force of the exclusionary rule in the one area in which its use is most certainly justified- the deterrence of bad-faith violations of the Fourth Amendment.

> See Stone v. Powell, 428 U.S. at 536- 542, 96 S. Ct., at 3072 2074 (WHITE, J., dissenting). This decision invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant. Should something be found, only the owner of the vehicle, or of the item, will have standing to seek suppression, and the evidence will presumably be usable against the other occupants. .....After this decision, police will have little to lose by unreasonably searching vehicles occupied by more than one person.

The fears expressed by the dissenters in Rakas are equally applicable to the current case involving the illegal search of a residence.

There is little doubt that the law enforcement activity involved in this case constituted an unlawful search and seizure, and an illegal arrest of the Defendant Carralero. The law enforcement

officers knew that they could obtain a serach warrant; yet, they went to an isolated farmhouse after dark with four car loads of uniformed officers carrying shotguns and automatic weapons under the pretext of going out to ask the occupants of the house some questions about a kidnapping and some marijuana. If the officers were genuinely going to the farmhouse to do a routine investigation, they would not have had the police lights flashing as they approached the farmhouse; nor would they have sent a police unit to the rear of the property to secure the back of the property.

The Government contended that the complete and thorough search of the entire premises and adjacent structures was necessary to secure the grounds because officers were outside the structures with

co-defendant Garcia under arrest for crouching behind a car. Even prior to anyone finding the marijuana, Defendant Carralero and co-defendant Leyva were arrested for apparently hiding under a car in an open field. This is a case were the officers unlawfully searched the premises, seizing articles for use at trial and arrested the defendants under the pretext that they were conducting a routine investigation. Such violations of the Defendant's Fourth Amendment rights should not be tolerated, and all of the evidence seized as a result of the unlawful search and illegal arrest of Defendant Carralero should be suppressed. United States v. Harris, 321 F. 2d 739 (6th Cir. 1963).

Procedurally, the person who asserts his rights were violated under the Fourth Amendment has the burden of alleging and,

if challenged, of establishing the foregoing requirements. However, if the movant establishes an expectation of privacy and that the search and seizure took place without a search warrant, then the burden shifts to the Government to establish that an exception to the search warrant requirements was applicable in the subject case, and that the search and seizure was a reasonable one. United States v. Bachner, 706 F. 2d 1121, 1125-1126 (11th Cir. 1983).

In the instant case, the standing issue was presented by the Government for the first time almost as an afterthought after the conclusion of the evidentiary portion of the suppression hearing. (Supp. Tr. A. 15). Therefore, Defendant was not provided adequate notice that he was to be put to his proof on the issue of

Defendant's reasonable expectation of privacy in the items seized from the farmhouse. Moreover, the record is totally void of any factual determinations with regard to whether Defendant had a reasonable expectaion of privacy in the items seized from the farmhouse. Under such circumstances, the denial of Defendant's Motion to Suppress should at least be vacated and remanded. United States v. Bachner, 706 F. 2d 1121 (11th Cir. 1983). See also, Combs v. United States, 408 U.S. 224 (1972).

B.

The Court Erred In Denying Defendant's Motion To Suppress Evidence Of His Fingerprints

As noted above, the trial court acknowledged that all of the evidence seized from the farmhouse was illegally seized. However, the Court denied

Defendant Carralero's Motion to Suppress because he lacked "standing" to raise the issue. The Court likewise denied Defendant's Motion to Suppress the evidence of Carralero's fingerprints obtained in the house. (Tr. 23-35).

Assuming arguendo, that Carralero did not have a legitimate expectation of privacy in the farmhouse, even a casual visitor has a right to challenge the lawfulness of a seizure of evidence or search if his own property were seized. Rakas v. Illinois, 439 U.S. 128, 142-143, n. 11 (1979). For example, in United States v. Robertson, 606 F. 2d 853, 858, n. 2 (9th Cir. 1979), the Court found that eventhough the defendant did not have a proprietary interest in the house of a friend, he did have such an interest in the items of his clothing and his person that were seized in the search.

Defendant asserts that he clearly has a reasonable expectation of privacy in his fingerprints, therefore, the admission into evidence of the fingerprint standards or exemplars that were taken from Defendant Carralero should have been suppressed as fruits of an illegal search and an illegal detention.

The Government contends first that at the time Defendant Carralero was taken from underneath the car that was a Terry stop; next, that the officers had probable cause for the arrest and search because the officers could smell the odor of marijuana from the rear porch without going inside; and finally, that under the "inevitable discovery" doctrine of Nix v. Williams, 104 S. Ct. 2501 (1984), the fingerprints of Defendant Carralero on the weight pad would have been obtained by

the Government during its investigation once it was determined there were fingerprints on the pad; and would therefore be admissible. (Tr. 8-9). The evi dence at trial and the current case law simply does not support the Government's position.

At the outset, the record is clear that this was not just a Terry stop. The Defendant Carralero was arrested as soon as he was removed from underneath the abandoned vehicle. In discussing what constitutes a Fourth Amendment seizure, the United States Supreme Court observed in United States v. Mendenhall, 446 U.S. 544 (1980):

> We conclude that a person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the inci-

> dent, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the theatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id. at 554. Similarly, in Dunaway v. New York, 442 U.S. 200 (1979), the Court declared that if a defendant "was never informed that he was 'free to go'," or if the defendant "would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody," then an arrest of the defendant had taken place and this arrest must have been supported by probable cause. Id. at 212. See also, Florida v. Royer, 103 S.Ct. 1319 (1983).

In the instant case, it is without question that the Defendant was arrested when Agent Joura removed him from underneath the car. Agent Joura, the supervisor in charge of this "investigation," testified that he considered Carralero to be under arrest when he took him from under the car (Supp. Tr. 107), even though there was no indication whatsoever as to the charges against the Defendant.

Similarly, it cannot be said that the law enforcement personnel had probable cause to arrest the Defendant. In its decision of United States v. Blasco, 702 F.2d 1315 (11th Cir. 1983), the Court declared:

> Probable cause to arrest exists where the facts and circumstances within the collective knowledge of the law enforcement officials, of which they had reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed.

The record in the instant case reveals that Defendant Carralero was already handcuffed in front of the farmhouse before any marijuana was discovered on the premises. (Supp. Tr. 73, 76-77). Therefore, it would have been absolutely impossible for the law enforcement personnel to have had probable cause for arrest at the time that Defendant Carralero was arrested.

Finally, with regard to the Nix "inevitable discovery" doctrine, the Government argues that during its investigation of this case, it would have subpoenaed all of the individuals at the farmhouse and brought them before the grand jury at which time fingerprint identifications would have been made. Hence, the discovery of Carralero's fingerprints would have been inevitable. (Tr. 9).

However, for evidence to qualify for admissibility under the "inevitable discovery" doctrine, two requirements must be met, to wit, "there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued 'prior' to the occurrence of the illegal conduct." United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984).

In the instant case, neither of the foregoing requirements were met. There were eight people found in the farmhouse, five of whom were arrested that night, two of whom the Government declined to prosecute. Therefore, only the three persons

who were arrested had their fingerprints taken. The other people whose fingerprints could have matched prints on the pads were never brought to the Grand Jury or fingerprinted by the Government. Hence, the Government cannot, at this time, take the position that once it discovered the fingerprints on the pads, that it would have brought everybody before the Grand Jury and took fingerprints.

As noted above the Government, in fact, did not bring everybody before the Grand Jury. Moreover, but for the illegal detention of Defendant Carralero, the Government would not have known his identity.

Next, the Government failed to satisfy the second requirement for the admissibility of evidence under the

"inevitable discovery" doctrine because the Government clearly did not possess the legal means that would have led to the discovery of Defendant's fingerprints, nor were those means being actively pursued prior to the illegal conduct.

Based on the foregoing, Defendant Carralero's Motion to Suppress his fingerprint evidence should have been granted. Defendant's presence at the farmhouse and his flight when the law enforcement personnel raided the farmhouse, the fingerprint evidence is the only evidence that even remotely ties Defendant to the charges in the indictment. Therefore, Defendant's convictions should be reversed.

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals in this Case is in irreconcilable conflict with the dictates of the Fourth Amendment to the United States Constitution. To permit law enforcement officers to search premises and arrest individuals, without probable cause and with full knowledge that they cannot obtain a search warrant represents a clear violation of Elecdoro Carralero's constitutional rights. Certiorari should be granted to remedy the injustice created in this case and to end the assault on individual freedoms guaranteed by the Fourth Amendment.

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By Leon E. Sharpe
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition have been served by United States Mail this 27th day of December, 1985, upon the Office of the United States Solicitor General, 10th and Constitution Avenue, N.W. Washington, D.C., 20530, and a copy upon Michael Runowicz, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130.

Leon E. Sharpe

LEON E. SHARPE, ESQUIRE

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-5569
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELECDORO CARRALERO,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(October 28, 1985)

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

Elecdoro Carralero appeals his conviction in district court of conspiracy to

possess with intent to distribute marijuana in violation of 21 U.S.C. Section 846 and possession with intent to distribute marijuana in violation of 21 U.S.C. Section 841 (a) (1) and 18 U.S.C. Section 2.

Carralero was arrested in a raid of a farmhouse by D.E.A. agents and police. The house contained 1200 pounds of marijuana and various paraphermalia. Carralero was found hiding under an abandoned vehicle in a field behind the farmhouse.

On appeal to this court Carralero claims first, that the district court erred in denying his motion to suppress the physical evidence seized during the unlawful search of the farmhouse; second, that the court erred in denying his motion

to suppress evidence of his fingerprints; and finally, that the evidence was insufficient to support his conviction.

From our consideration of the record and the briefs of the parties, we conclude that Carralero's contentions are without merit.

AFFIRMED.